GIBB & CO.

v.

MALAYSIA BUILDING SOCIETY BHD.

FEDERAL COURT, IPOH
RAJA AZLAN SHAH CJ (MALAYA)
SALLEH ABAS FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 186 OF 1950]
1 & 5 FEBRUARY 1982

***CIVIL PROCEDURE*:** *Interlocutory injunction before trial - Interlocutory injunction amounting to final relief - Balance of convenience.*

The respondent in this case was a company providing finance for housing development. The developers applied to the respondent for end-finance for its housing project, and the respondent approved the application for 85 units in a total loan commitment of RM1,457,100. The individual purchasers of the several units applied to the respondent for loans. The appellant acted as solicitors for all parties, that is, the respondent, the developer and the purchasers. The respondent paid the amount due to the charges of the land to enable the separate titles to be issued to the purchasers to be free from encumbrance. On obtaining the issue documents of title for the 85 units and other relevant documents the respondent handed them to the appellant for the requisite documentation. At this stage a dispute developed between the appellant and the developers who appointed new solicitors to act for them and also between the purchasers and the developers. The purchasers alleged that the developers had collected money for extras from them and as a result the price of the units had been increased. The appellant had caused the transfers in favour of the purchasers to be registered but in spite of repeated requests by the respondent failed to register the charges in favour of the respondent in respect of 82 units. The respondent appointed other solicitors to protect its interests. The respondent then lodged caveats against the land. It issued a writ to claim declarations that it was entitled to the custody of the documents of title and instruments of charge and an order for the appellant to deliver the documents to them. It then applied for an interlocutory order for the appellant to forthwith deliver to it the issue documents of title and the instruments of charge. The High Court granted an order accordingly. The appellant appealed to the Federal Court. The grounds of appeal argued were:

(1) that in all the circumstances of the case and taking into account the fact that the relief sought for at the interlocutory stage amounted to final relief, the order ought not to have been made;

(2) that the balance of convenience, taking into account the fact that the order would in fact affect the rights of third parties not before the Court, namely the developer and the purchasers, was against the making of the order.

The Federal Court dismissed the appeal. Abdoolcader J in giving the judgment of the Federal Court dealt first with the argument that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. Although the learned Judge agreed that statement of the law was correct, he stated that there was no reason why interlocutory or indeed interim mandatory injunctions should not be issued in proper and appropriate cases and the Court has jurisdiction to so order. The case however must be unusually sharp and clear and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted. He said:

> In deciding the manner of interlocutory injunction that should be granted Courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the Court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction [*Bonner v. Great Western Railway Company* [1883] 24 Ch D 1, 10]. Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once [*Strelley v. Pearson* [1880] 15 Ch D 113, 117].

The learned Judge then dealt with he first ground of appeal that the relief ought for at the interlocutory stage mounted to final relief. He said:

> The short answer to the issue raised in this respect is that the Court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience. If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction would issue even if it gives the applicant his whole remedy before the trial.

The learned Judge said:

> In the matter before us the purchasers' dispute is with the developer who they allege has defrauded them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must necessarily have security by way of charges over the several units in question. Considering all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the Court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action.

The learned Judge then dealt with the second argument which was that the balance of convenience weighed against the order sought in the respondent's motion in the light of the fact that any such order would affect the rights of the developer and the purchasers who were not but should have been before the Court. The learned Judge pointed out that the purchasers were at all times represented by the appellant who purported to protect their interests. Even assuming the purchasers were separately represented in the matter, it was wholly inconceivable that any argument could have been put forward on their behalf which the appellant did not or could not. Moreover the developers were in no way concerned in the matter of the respondent's claim to entitlement to the documents of title and the registration of the charges by the purchasers in its favour. The purchasers' dispute is not with the respondent but with the developers and the respondent is entitled to be registered as charge of the land in question as it has disbursed a substantial part of the end-finance approved by way of loans granted to the purchasers. The registration of the charges will not affect the interests of the purchasers as they will not be asked to pay a larger sum than what has actually been disbursed for each of them nor is there any question of such

registration affecting the interests of the developers. There is therefore no substance or merit in the second ground and the balance of convenience was in favour of granting the application for the interlocutory injunction.

It might be noted that Abdoolcader J pointed out that the case "*posiu* and demonstrates yet once again the perils solicitors face in acting for more than one party in property transactions and in consequence constraining them not infrequently into adopting invidious and untenable partisan positions in the event of ensuing conflicts of interests."

Cases referred to:
Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd. [1979] 1 MLJ 150 ***(refd)***
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok [1975] 2 MLJ 109 ***(refd)***
Canadian Pacific Railway v. Gaud [1949] 2 KB 239 ***(refd)***
Bonner v. Great Western Railway Company [1883] 24 Ch D 1 ***(refd)***
Shepherd v. Sandham [1971] Ch 340 ***(refd)***
Strelley v. Pearson [1880] 15 Ch D 113 ***(refd)***
Woodford v. Smith [1970] 1 WLR 806 ***(refd)***
Manchester Corporation v. Connolly [1970] 1 Ch 420 ***(refd)***
Bryanston Finance Ltd. v. De Vries (No. 2) [1976] 1 Ch 63 ***(refd)***
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 ***(refd)***
Fellowes & Son v. Fisher [1976] QB 122 ***(refd)***
N.W.L. Ltd. v. Woods [1979] 1 WLR 1294 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the appellant - G. Sri Ram; M/s. Gibb & Co.
For the respondent - Raja Abdul Aziz Addruse; M/s. Rithauddeen & Aziz

JUDGMENT

Eusoffe Abdoolcader J:

This case posits and demonstrates yet once again the perils solicitors face in acting for more than one party in property transactions and in consequence constraining them not infrequently into adopting invidious and untenable partisan positions in the event of ensuing conflicts of interests.

We need only state the facts of this matter somewhat concisely in view of the grounds advanced in the presentation of this appeal. The respondent is a company providing finance for housing development in the country and was appointed by the Government of Malaysia in January 1977, to implement the Government's Low Cost Housing Finance Programme ('the programme') under which the respondent is to provide end-finance to developers of approved low cost housing projects and for that purpose to provide loans to the purchasers of such houses. For any housing project to qualify for financing under this programme, the selling price of each housing unit inclusive of the land cannot exceed RM20,000.

In June 1977 Arief Trading Sdn. Bhd. ('the developer'), applied to the respondent for end-finance for its housing project known as Tasek Jaya Baru, and in its application the developer stated that the purchase price of each housing unit was RM19,250 and that its solicitors were the appellant. The respondent approved the application for end-finance for 85 units in a total loan commitment of some RM1,457,100. In November 1977 the individual purchasers of the several units applied to the respondent for loans through the developer and in their applications the purchasers confirmed that the purchase price of each unit was RM19,250. It is clear from the record that the appellant was at all material times acting as solicitors for the respondent, the developer and the purchasers. The appellant then on the instructions of the

respondent dealt with the matter and prepared a report on the titles of the land involved which disclosed that the land was charged to Keng Soon Finance Berhad ('Keng Soon') to secure a loan then still outstanding, and on the advice of the appellant that the separate titles to be issued to the purchasers should be free from incumbrances and as the developer was unable to discharge its debt to Keng Soon, the respondent, again on the advice of the appellant, paid the amount outstanding to Keng Soon on behalf of the developer to redeem the charges and this was to be treated as partial disbursement of the loans granted to the purchasers. The respondent paid the money on condition that on the discharge of the charges in favour of Keng Soon, the transfers of the 85 units to the purchasers thereof and the charges thereon by the latter in favour of the respondent should be presented for registration simultaneously, and indeed the appellant gave an undertaking to that effect and another undertaking for the refund of all moneys paid to it on behalf of the developer if the charges were not presented for registration by a specified date.

The respondent on obtaining the issue documents of title for the 85 units and other relevant documents from Keng Soon handed these to the appellant for the requisite documentation. Without going into any detailed elaboration it would suffice to say that disputes then developed between the appellant and the developer who appointed new solicitors to act for it and also between the purchasers and the developer. The purchasers alleged that the developer had collected from each of them some RM3,750 and certain other sum for extras which apparently were never provided and they alleged fraud on the part of the developer and also that as a result of these payments by them the purchase price for each unit had increased to beyond the maximum stipulated for the purposes of the Programme. The appellant had caused the transfers in favour of the purchasers to be registered but in spite of repeated requests by the respondent failed to register the charges in its favour in respect of 82 units. The reason for this was that the appellant had now taken up the cudgels on behalf of the purchasers for whom it was acting as well, claiming that it was its duty to protect their interests, and insisted that the amount payable to the developer should be reduced and that the respondent should agree to reduce the amount of the loan specified in the charges executed by the purchasers and even threatened, on the instructions of the purchasers as it said, to unilaterally alter the charges executed to this effect. Acrimonious correspondence then ensued and as a result of the appellant's refusal to register the charges the respondent appointed other solicitors to protect its interests in the matter.

The respondent had by that time disbursed well over a million dollars towards the end-finance agreed to be provided and it accordingly in the circumstances lodged caveats against the land in question in May 1979. The respondent then issued a writ on 17 August 1979, to claim declarations that it is entitled to the custody of the issue documents of title and the instruments of charge executed by the purchasers of 82 units and to present the charges for registration and an order for the appellant to forthwith deliver up to it the issue documents of title and instruments of charge, and also damages. On 6 September 1979, the respondent took out a motion to seek an interlocutory order for the appellant to forthwith deliver up to it the issue documents of title and the instruments of charge executed by the purchasers of the 82 units. The High Court heard the motion on 16 June 1980, and granted an order accordingly.

The appeal was argued before us only on two grounds which are wholly dehors the memorandum of appeal but which however we allowed, *scilicet:*

(1) that in all the circumstances of the case and taking into account the fact that the relief sought for at the interlocutory stage amounted to final relief, the order ought not to have been made;

(2) that the balance of convenience, taking into account the fact that the order would in fact affect the rights of third parties not before the Court, namely the developer and the purchasers, was against the making of the order.

Before we deal with the issues raised we should perhaps touch on a point made by Mr. Sri Ram for the appellant in referring to the judgment of this Court in *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109, 114, restates *inter alia* that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v. Gaud* [1949] 2 KB 239, 249 (at p. 249)), but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the Court has jurisdiction to so order. Fry LJ, said in *Bonner v. Great Western Railway Company* [1883] 24 Ch D 1, 10 (at p. 10): "I have no doubt of the jurisdiction of the Court to grant a mandatory injunction on interlocutory applications as well as the hearing". The case however must be 'unusually sharp and clear' (*Shepherd v. Sandham* [1971] Ch 340), and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend *inter alia* upon considerations of hardship to the parties.

In deciding the manner of interlocutory injunction that should be granted Courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the Court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interest be protected by the immediate issue of an injunction (*Bonner v. Great Western Railway Company* [1883] 24 Ch D 1). Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v. Pearson* [1880] 15 Ch D 113, 117 (at p. 117).

Adverting now to the points taken in advancing the appeal:

Whole relief granted by interlocutory order

The short answer to the issue raised in this respect is that the Court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v. Smith* [1970] 1 WLR 806, 817, 818 (at pp. 817-818); *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109 (at p. 114); *Sivaperuman v. Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 MLJ 150. If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v. Connolly* [1970] 1 Ch 420, 427 (at p. 427)).

In *Bryanston Finance Ltd. v. De Vries (No. 2)*, [1976] 1 Ch 63, 76, 81, Buckley LJ, said (at p. 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The Court in this case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would *prima facie* be an abuse of process, and Sir John Pennycuick said (at p. 81):

> The decision in the *American Cyanamid* [1975] AC 396 was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action. I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action ...

This is in effect a judicial acknowledgment on the lines of the observation by Lord Denning MR, in *Fellowes & Son v. Fisher* [1976] QB 122, 129 (at p. 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in his judgment in the House of Lords in *N.W.L. Ltd. v. Woods* [1979] 1 WLR 1294, 1306 (at p. 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396.

In the matter before us the purchasers' dispute is with the developer who they allege has defrauded them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the Programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must necessarily have security by way of charges over the several units in question. Considering all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the Court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action.

Balance of convenience in relation to right of third parties not before the Court

Mr. Sri Ram contends that the balance of convenience weighed against the order sought in the respondent's motion in the light of the fact that any such order would affect the rights of the developer and the purchasers who were not but should have been before the Court as parties, and submits that they should have been added as parties to the proceedings under the provisions of O. 15 r. 6(2)(b) of the Rules of the High Court 1980 which empower the Court to do so either on its own motion or on application. This point was never raised or taken in the Court below and no application was made by or on behalf of the appellant to this effect and we would immediately observe that this is not at all surprising since any such application, if made, would have been farcical and superfluous as it is abundantly clear that the purchasers were at all material times represented by the appellant whose interests the appellant was purporting to protect and project, and indeed the institution of these proceedings by the respondent was necessitated by the appellant's refusal to deliver the requisite documents to the respondent and cause the charges executed by the purchasers to be registered for this very reason. Even assuming the purchasers were separately represented in this matter, it is wholly inconceivable that any argument could have been put forward on their behalf which the appellant did not or could not. We cannot see how the developer is in any way concerned in this matter of the respondent's claim to entitlement to the documents of title and the registration of the charges by the purchasers in its favour.

The purchasers' dispute is not with the respondent but with the developer, and the respondent is entitled to be registered as charge of the land in question as it has disbursed a substantial part of the end-finance approved by way of the loans granted to the purchasers, and this entitlement is in no way affected by the dispute between the purchasers and the developer in respect of the amounts for extras alleged to have been improperly collected by the latter. In so far as the respondent is concerned the liability of the purchasers for repayment under the terms of the charges would be the amounts actually disbursed by the respondent on behalf of each of them. We should perhaps mention that the respondent has in fact for the time being retained a sum of RM3,750 in respect of each purchaser and notified the developer why it was doing so and the respondent has since received a notice from the developer's solicitors threatening proceedings to recover the amounts so retained. The registration of the charges will not affect the interests of the purchasers as they will not be asked to pay a larger sum than what has actually been disbursed for each of them, nor is there any question of such registration affecting the interests of the developer. As we have stressed, and we do so again, the appellant was and has been throughout representing the purchasers to vent their grievances and safeguard their interests and it is on this account that the appellant had refused to part with the documents of title or caused the charges to be registered in favour of the respondent, a stance that inevitably culminated in these proceedings by the respondent and the order on the motion now under appeal before us.

In the premises we find no substance or merit in the second ground raised on behalf of the appellant. We have in dealing with the first ground of appeal touched on the question of the balance of convenience and find this on the facts of the matter to be clearly in favour of the respondent.

We accordingly at the conclusion of argument dismissed this appeal with costs and directed the deposit lodged in Court by way of security to be paid out to the respondent to account of its costs.

Also found at [1982] 1 CLJ 185